

DATE: December 5, 1997
CASE NO. 95-INA-409

In the Matter of:

PC LINK, USA
Employer

on behalf of

CHIN CHEN
Alien

APPEARANCE: Robert J. Gaynor, Esq.
For the Employer

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and

the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On January 24, 1994, the Employer, PC Link, USA, filed an application for labor certification to enable the Alien, Chin Chen, to fill the position of "Overseas Computer Wholesaler," which was classified by the local job service as "Wholesaler II." The job duties for the position were described as follows: "Arrange for the purchase and export of computer components to Taiwan and Europe." (AF 101).

The stated requirements for the position are: 2 years of college "anywhere in world;" 2 years of experience in the Related Occupation of Computer Wholesaler; and, "must be fluent in Chinese and English." (AF 101).

The CO issued a Notice of Findings on August 24, 1994 (AF 84-85) and a second Notice of Findings on November 8, 1994 (AF 32-34). In pertinent part, the CO proposed to deny certification on the grounds, *inter alia*, that the Employer failed to establish that it has enough funds available to pay the wage or salary offered the Alien, in violation of the provisions of §656.20(c)(1).

The Employer submitted its initial rebuttal on October 26, 1994 (AF 35-80) and supplemental rebuttal on December 27, 1994 (AF 8-29). The CO found the rebuttal unpersuasive and issued a Final Determination on April 4, 1995, denying certification on the same grounds (AF 3-7).

On April 27, 1995, the Employer filed a request for review of the denial of certification (AF 1-2). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals for review.

Discussion

In the Notice of Findings, dated November 18, 1994, the CO questioned some of the rebuttal evidence which had been submitted in response to the earlier Notice of Findings. In pertinent part, the CO stated:

From a review of the employer's rebuttal documentation submitted to this office on October 27, 1994, the Certifying Officer (C.O.) has several concerns regarding the employer's statements/documentation such as:

1. STATE OF NEW HAMPSHIRE - EMPLOYER TAX AND WAGE REPORT (QUARTERLY) - This document shows that the employer has no employees currently employed and therefore, no taxes were due to the State of New Hampshire as of October 1, 1994. Since the employer does not employ any staff, how does the employer intend on hiring the alien?

2. EMPLOYER'S QUARTERLY FEDERAL TAX RETURN - From a review of this document dated October 1, 1994, the employer has claimed zero (0) in earnings and tax returns for the previous quarter. Therefore, it would appear that the employer may not be in business and may not have sufficient funds to pay the alien's salary. Therefore, the employer must provide all of 1994 EMPLOYER'S QUARTERLY FEDERAL TAX RETURNS which show earnings and deductions that the employer has made within the past year. Furthermore, it appears from a review of the EMPLOYER'S QUARTERLY FEDERAL TAX RETURN that the employer may not have enough funds available to pay the wage and salary offered to the alien. Please clarify.

3. ARTICLES OF INCORPORATION, MINUTES OF THE FIRST MEETING OF THE BOARD OF DIRECTORS, PC LINK BY-LAWS - From a review of these documents, it appears that PC Link is comprised of a President, Jeng Shia Cheng, Treasurer, Hsueh Mei Chang, and a Clerk, Julia Li. It appears that these officers may be receiving some sort of income/salary from PC Link. However, the Quarterly Tax Reports (both state and federal) show that the employer has claimed zero (0) for income and has also claimed that no employees are employed. How can the employer claim zero for income and not employee (sic) any individuals and still have three individuals employed as President, Treasurer, and Clerk? How are these individuals compensated/paid? And why were these employees not listed with the State of New Hampshire Employer Tax and Wage Report (Quarterly)?

It should be noted that the employer filed and signed both the Employer's Quarterly Federal Tax Return and the New Hampshire Employer Tax and Wage Report (Quarterly) on October 1, 1994 nearly a month and a half after receiving the Notice of Findings (NOF) which was issued by this office on August 24, 1994. Therefore, it appears that the employer is merely attempting to show that an actual bona fide job opportunity exists by filing these tax reports after receiving the NOF. However, the CO does question these actions in which the employer is attempting to establish that (a) job opportunity does exist. The employer must provide additional tax records to show that the position did exist prior to the issue (sic) of the NOF on August 24, 1994.

Once again the issue of the employer's address and phone number has been left unanswered by the employer. The Notice of Findings issued on August 24, 1994 questioned the employer's phone number was (sic) that of Mr. Chang's private residence and asked for clarification of the this (sic) issue. Therefore, the employer must clarify the address and telephone issue.

(AF 33-34).

The Employer's rebuttal to the most recent Notice of Findings consists of a cover letter by its attorney, dated December 27, 1994 (AF 8), a letter by Jensen Cheng, President of PC Link USA (AF 9), copies of various shipping documents (AF 10-24), correspondence by Mei-Jung

Fan, a Certified Public Accountant, dated December 24, 1994 (AF 25) , together with a balance sheet, dated December 20, 1994 (AF 26) and income statement for the period from October 1, 1994 through December 20, 1994 (AF 27-29).

The letter by Jensen Cheng, President, states: 1. PC Link is a corporation, which had been a sole proprietorship owned by Hsueh Mei Chang. Since it engages in computer exporting, there is no need to advertise in the Yellow pages. Therefore, they did not change the telephone number from Mr. Chang to a corporate number. 2. Ms. Yiin Chen and Ms Chin Chen (*i.e.*, the Alien) have been in Germany for several years and are specialized in marketing computer products to Europe. "PC Link needs to hire Ms. Yiin Chen and Ms. Chin Chen for their good contacts in Europe and expertise in computer wholesale business in Europe/Germany." Over the past several months they have located major European computer buyers for us. 3. PC Link started with over \$200,000 capital and is capable of paying the salary of both Ms. Yiin Chen and Ms. Chin Chen for their marketing jobs in Europe. "(W)e need their expertise to expand our market over there. 4. President Clinton urged small businesses in the private sector to explore overseas opportunities. "We like to share our responsibility and be a part of it." 5. Enclosed are shipping documents and a financial statement "to prove that we are running a legitimate export business for computer and components. 6. "It took us quite a while to promote products in Europe, we had business activities and earning on (sic) 4th quarter, 1994." (AF 9).

The shipping documents referred to above consist of various Airway bills which indicate that several computer parts were transported from the Employer to different cities in Europe in October, November, and December 1994 (AF 10-24).

The balance sheet, dated December 20, 1994, reveals cash assets of \$224,147 (AF 26); however, the income statement for the period from October 1, 1994 through December 20, 1994; shows a net income for that quarter of only \$7,064 (AF 27-29). Moreover, Mei-Jung Fan, the Certified Public Accountant who prepared these documents, stated:

Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the company's financial position, results of operations, and changes in cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

(AF 25).

In the Final Determination, the CO found the Employer's rebuttal to be inadequate and unresponsive to many of the questions raised in the Notice of Findings, dated November 8, 1994. Furthermore, the CO noted that the rebuttal evidence fails to document that there were funds available to pay the Alien's wages at the time that the application for labor certification was filed. We agree.

Upon review, we find that the Employer's rebuttal does not directly address several issues

raised by the CO in the second Notice of Findings regarding various discrepancies in the Employer's Federal and State tax records. Furthermore, the evidence is, at best, ambiguous regarding the Employer's financial situation and its ability to pay the Alien's salary. The quarterly tax returns show no employees and no reported income through September 30, 1994 (AF 42). Moreover, the probative value of the balance sheet and income statement as of December 20, 1994 (AF 26-29) is substantially undermined by the accountant's disclaimer (AF 25). In addition, we note that, even if credited, the net income before taxes for almost all of the last quarter of 1994 was only \$7,064 (AF 27), and that this income was generated approximately ten months *after* the Employer filed the application for labor certification (AF 101).

It is well settled that an employer's failure to provide documentation reasonably requested by the CO for information showing the ability to pay the wages offered will result in a denial of labor certification. **See, e.g.,** *Foothill Division Karate Club*, 93-INA-494 (Oct. 11, 1994); *Pastucha Art*, 93-INA-305 (Apr. 6, 1995); *The Whislers*, 90-INA-569 (Jan. 31, 1992). In view of the foregoing, we agree with the CO's determination that the application for certification should be denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered on this 5th day of December, 1997.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party

petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.